United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ESTHER FRIEDLANDER as Surviving Executrix of the Estate of RAPHAEL COHEN,

Plaintiff-Appellant,

—against—

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., AGRIN, LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

On Appeal from an Order of the United States District Court for the Southern District of New York

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BRIEF ON BEHALF OF DEFENDANT-APPELLEE HARRIS, KERR, FORSTER & COMPANY

Introduction

In this action for damages and other relief allegedly arising from defendants-appellees' violations of federal

and state security laws in the issuance of a prospectus, plaintiff-appellant, the sole surviving personal representative of her deceased father, a purchaser of a limited partnership interest in realty, appeals from Judge Ward's order denying class action status. (Hereafter the letter A followed by a number in parentheses refers to the joint appendix except where otherwise indicated.)

Question Presented

Was the District Court correct in denying class action status?

Facts

This action for damages was commenced by filing of the complaint on June 17, 1970 (A-1).

Plaintiff-appellant purports to sue on three counts, one federal and two pendent:

First, under Section 17(a) of the Securities Act of 1933 (15 U.S.C. §77q(a)), Section 10(b) of the Securities and Exchange Act of 1934 (15 U.S.C. §78j(b)), and Rule 10b-5 (17 C.F.R. §240.10b-5) (A-11);

Second, under Sections 352-c and 352-e of the New York General Business Law (A-12); and

Third, under "Common law" (A-12).

Plaintiff-appellant alleges that beginning in or about August 1959, in New York, the various above-named defendants-appellees conspired to defraud plaintiff-appellant's testator and the public at large by making misrepresentations in order to induce these persons to furnish equity capital to Drake Associates and in connection there-

with caused and assisted in the issuance of a written selling document, the Prospectus, dated October 22, 1959 (A-15, 16).

Plaintiff-appellant charges that defendants-appellees Peter I. Feinberg, Samuel Sokol, Louis Adler, Marvin Greenspan and Alfred Kaplan were general partners of Drake Associates and that defendants-appellees Domax Securities Corporation and Peter I. Feinberg Securities Corp. acted as agents of Drake Associates (A-14, 15). Plaintiff-appellant also includes as conspirators defendants-appellees William Zeckendorf and Zeckendorf Hotels Corporation (A-15). Finally, plaintiff-appellant also names Agrin Lawson & Holland, appearing herein as Lawson & Holland, and defendant-appellee Harris, Kerr, Forster & Company, both accounting firms, as defendants (A-16, 17).

Defendant-appellee Harris, Kerr, Forster & Company, a firm of certified public accountants, has no connection whatsoever with any claims alleged in the complaint and denies each and all accusatory allegations thereof. Only minimally its name appears on page 14 of the Prospectus where there is stated: the opinion of defendant-appellee Harris, Kerr, Forster & Company on the summary of the Hotel Drake for the period from August 1 to December 31, 1958, during which period the hotel was operated under a lease by Zeckendorf Hotels Corporation except for the month of August, 1958 when the operations were conducted by the Hotel Drake Corporation under a sublease, and the opinion of defendant-appellee Harris, Kerr & Forster & Company on the balance sheet of Drake Associates at September 30, 1959. There is nothing other than or subsequent to that insofar as defendant-appellee Harris, Kerr, Forster & Company is here concerned (A-77-78).

Following plaintiff-appellant's dilatory submission to deposition upon oral examination by various defendants-appellees, including defendant-appellee Harris, Kerr, Forster & Co., and dilatory and insufficient responses to Interrogatories and following motions for summary judgment by defendants-appellees, which were denied (A-220), plaintiff-appellant's motion for class action status was first made returnable in March, 1974. Judge Ward denied the motion (A-222).

POINT I

Plaintiff-appellant has not demonstrated and sustained her burden of proving that this action satisfies the statutory and other requirements for maintenance as a class action.

a. Plaintiff-appellant was grossly and inexcusably dilatory in applying for class action status and prosecuting this lawsuit and cannot properly represent the class.

The District Court properly found that: there were no circumstances which would justify plaintiff-appellant's delay of almost four years in moving for class action status (A-221); plaintiff-appellant's failure to prosecute the action showed clearly that she was unfit fairly and adequately to protect the interest of the class. Fed.R.Civ.P. Rule 23(a)(4); and plaintiff-appellant failed within sixty days after filing the complaint asserting the class action claim to move under Southern District Civil Rule 11A(c) for maintenance of the action as a class action (A-220, 221).

In holding that plaintiff-appellant did not evidence the interest in class claims necessary for the fair and ade-

quate protection of such claims, the District Court cited *Mersay* v. *First Republic Corporation of America,* 43 F.R.D. 465 (S.D.N.Y. 1968). The District Court based this conclusion upon the untimeliness of plaintiff-appellant's motion and the absence of diligent prosecution, citing *Jonah Dienstag* v. *Alexander N. Bronsen,* 68 Civ. 576 (S.D.N.Y. May 12, 1972) (not officially reported); see also, *Taub* v. *Glickman,* CCH Fed. Sec. L Rep. § 92,874 (S.D. N.Y. Dec. 1, 1970) (not officially reported).

The District Court was unquestionably right in reaching these conclusions.

b. Plaintiff-appellant has not sustained her burden of showing the requisite probability of success on the merits.

There is no substantial probability that plaintiff-appellant will succeed on the merits. Plaintiff-appellant has not sustained her burden of proving the requisite probability of success on the merits. The record shows that plaintiff-appellant has no case on the merits and that the Court and defendants-appellees will be put to unfair and undue burden and expense if this action is determined to be maintained and continued as a class action. The District Court correctly denied plaintiff-appellant's motion for class action status. See *Dolgow* v. *Anderson,* 53 F.R.D. 664, 669 (E.D.N.Y. 1971); *aff'd* 464 F. 2d 437, 439 (2nd Cir. 1972).

c. Plaintiff-appellant has not sustained her burden of proving that questions of law and fact common to all members of the prospective class predominate over the totality of the individual issues here.

Plaintiff-appellant has not shown or sustained her burden of proving that questions of law and fact common to all members of the prospective class predominate over the totality of the individual issues hereof, particularly, Statutes of Limitations, reliance, and damages.

POINT II

Plaintiff-appellant having failed to sustain her burden of proving that the action should be maintained as a class action, Judge Ward's order denying class action status should in all respects be affirmed, with costs to defendant-appellee Harris, Kerr, Forster & Company.

December, 1974

Respectfully submitted,

MENDES & MOUNT
By JAMES G. GRADY
Partner
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Harris, Kerr, Forster & Company

JAMES G. GRADY,
Of Counsel

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